No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

VS.

THE STATE OF OKLAHOMA,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

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BRIEF FOR AMICUS CURIAE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The International Human Rights Law Group (Law Group) is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals.

With respect to the issue of the execution of juvenile offenders in the United States, the Law Group has testified in opposition to such practice before Congress and has co-sponsored a petition challenging the practice before the Inter-American Commission on Human Rights. The Commission, in a decision issued March 27, 1987, determined that the United States is violating Article I

(right to life) and Article II (right to equality before law) of the American Declaration of Human Rights by permitting the death penalty to be applied to juvenile offenders.

The Law Group respectfully submits and intends to demonstrate to this Court that relevant customary international human rights law, binding on the United States, prohibits the execution of juvenile offenders.

STATEMENT OF THE CASE

The petitioner, William Wayne Thompson, was convicted of first-degree murder and sentenced to death by an Oklahoma jury in 1983. Thompson was fifteen years of age when he, his older brother and two men killed his ex-brother-in-law in an unusually brutal fashion. Under Oklahoma's juvenile offender system, Thompson was certified

to stand trial as an adult. Each defendant was tried separately and each was convicted and sentenced to death.

Thompson's conviction was upheld by the Oklahoma Court of Criminal Appeals on August 29, 1986. That Court rejected petitioner's argument that execution of Thompson for a crime he committed at the age of fifteen would be unconstitutional cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court stated that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." Thompson v. Oklahoma, 724 P.2d 780 (Okl. Cr. 1986).

SUMMARY OF ARGUMENT

Under the Supremacy Clause of the Constitution (Article VI, Section 2), the states of the union are obliged to

respect international law, including customary international law. The Paquete Habana, 175 U.S. 677 (1900).

The prohibition against executing individuals for crimes committed prior to their eighteenth birthday has developed into a norm of customary international law. Compelling eivdence of the existence of this norm is found in the explicit provisions of three major human rights treaties, prohibiting execution of juvenile offenders, as well as in the practices of a large group of nations with diverse political, social and cultural traditions. The United States in large measure supported the development of this norm and certainly does not qualify as a "persistent objector" to it.

Given the existence of this international law norm, amicus submits that under Article VI of the United

States Constitution, Oklahoma is precluded from executing petitioner for a crime committed prior to his eighteenth birthday.

Amicus also submits that execution of the petitioner would violate United States treaty obligations. The United States has signed, but not ratified, treaties which prohibit the execution of juvenile offenders. Having signed these treaties, under the Vienna Convention on the Law of Treaties and under customary international law, the United States is bound not to defeat their object and purpose pending ratification. Since execution is irreversible, such an act would defeat the object and purposes of the signed human rights treaties in the sense proscribed by the Vienna Convention.

Even if the Court does not find that a binding norm of international law

exists, the almost universal international abhorrence to the imposition of the death penalty on those who were under the age of eighteen at the time of theri offenses should be considered in interpreting the Eighth Amendment.

For all of these reasons, amicus submits that the decision of the Oklahoma Court of Criminal Appeals should be reversed.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW WHICH FORMS PART OF THE LAW OF THE UNITED STATES PROHIBITS THE EXECUTION OF JUVENILE OFFENDERS

There are two general approaches to the application of international law before United States courts. The first approach looks to international law and the development of international norms to inform various provisions of the United States Constitution, including the Eighth

Amendment. 1/ The second approach, which is advanced in this brief, holds that the prohibition against execution of juvenile offenders is a norm of customary international law binding on the United States. As such, under Article VI of the United States Constitution, the several states are bound not to execute individuals for crimes committed prior to their eighteenth birthday.

A. Customary International Law Is Part Of The Law Of The United States.

That international law is part of United States law, applicable to

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1/ See generally Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analysis, 52 U. Cin. L. Rev. 3 (1983); see also Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting Application of the Death Penalty, 52 U. Cin. L. Rev. 655 (1983). The brief submitted amicus curiae by Amnesty International develops this argument as it relates to the instant case.

disputes among individuals as well as between individuals and the state, has long been recognized. See The Nereide, 13 U.S. (9 Cranch.) 388, 422 (1815) and The Paquete Habana, 175 U.S. 677 (1900). 2/ In fact, as the Second Circuit noted in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980),

> [t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the common law of the United States upon the adoption of the Constitution. 3/

Treaties are expressly made part of United States law by Article VI of the Constitution; customary international law has always been understood and applied as

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2/ See generally Dickenson, The Law of Nations as Part of the National Law of the United States, (pts. 1 and 2), 101 U. Pa. L. Rev. 26, 792 (1952).

3/ Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

the law of the Republic, a principle recognized by the Court in The Paquete Habana, supra. 4/

It is clear that not only international law as it existed in 1789 may be applied by United States courts. The evolving nature of international law was recognized in United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) and in Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796). 5/ As Justice Story put it in the case of La Jeune Eugenie:

> It does not follow . . . that because a principle cannot be found settled by the consent and practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as

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4/ See also Dickenson, supra n.1.

5/ Filartiga v. Pena-Irala, 630 F.2d at 887.

> incorporated into the public code of nations. 6/

This principle is especially significant in a case such as this, involving a norm which has developed over the last forty years.

While ascertaining customary international law presents problems different from those of finding domestic law, those practical difficulties in no way affect the binding force of customary international law. In the famous words of Mr. Justice Gray,

> [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling

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6/ U.S. v. La Jeune Eugenie, 26 F. Cas. 833, 846 (C. C. D. Mass. 1822) (No. 15,551) (holding that an international norm forbidding slavery exists).

> executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves particularly well acquainted with the subjects of which they treat.

The Paquete Habana, 175 U.S. at 700. See also Filartiga v. Pena-Irala, supra. Further, the role of custom as a source of international law is expressly recognized in Article 38 of the Statute of the International Court of Justice, T.S. No. 993, 59 Stat. 1055, 1060 (ratified July 28, 1945).

Two primary criteria are used to determine whether a principle has attained the status of a rule of customary international law. First, there must be evidence of State practice to show that the norm has been generally

adopted by nations. 7/ Second, the State practice should be accompanied by opinio juris or evidence that the norm has been accepted as giving rise to an international law obligation. 8/ Courts will look to treaties, national laws, the practice of international organizations and secondary materials as evidence of the existence of a customary norm of international law. For example, in Filartiga, supra, Judge Kaufman relied on treaty provisions, resolutions of public international bodies and opinions of prominent scholars to discover the norm

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7/ See Hartman, supra, note 1, at 666, 668, and sources cited therein, including Akehurst, Custom as a Source of International Law, 47 Brit. Y. B. Int'l L. 1, 53 (1974) at 18, 53; A. D'Amato, The Concept of Custom in International Law 87-92 (1971).

8/ See Hartman, supra, note 1 at 671; Akehurst, id. at 31-35, 53; K. Wolfke, Custom in Present International Law (1964).

prohibiting torture. See also the extensive discussion of the sources establishing a customary norm prohibiting the slave trade found in La Jeune Eugenie, supra.

B. Human Rights Treaties And The Practice Of Nations Establishes The Prohibition Against Capital Punishment Of Juvenile Offenders As A Norm Of Customary International Law.

1. Human Rights Treaties

Human rights treaties provide the most authoritative source of customary international law on the question of execution of juvenile offenders. The Vienna Convention on the Law of Treaties 9/ recognizes in Article 38 that a treaty may become "binding upon

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9/ U.N. Doc. A/CONF. 39/27 (1969), 63 A.J.I.L. 875 (1969) entered into force January 27, 1980, transmitted to the Senate for advice and consent on November 21, 1971, but not yet ratified.

a third State as a customary rule of international law, recognized as such." At least three major human rights treaties explicitly prohibit the imposition of the death penalty on juvenile offenders. 10/ An additional instrument, Protocol No. 6 to the European Convention on Human Rights, ratified by five nations and signed by all but six of the twenty-one Member States of the Council of Europe,

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10/ American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI 1.1, Doc. 65 Rev. 1 Con. 1 (1970) at Art. 4(5); International Covenant on Civil and Political Rights, Art. 6(5), Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16), at 53, U.N. Doc. A/6316 (1966); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 § 75 U.N.T.S. 287.

abolishes the death penalty entirely for crimes during peacetime. 11/

The human rights treaties exempting juvenile offenders from execution have been accepted and ratified by nations throughout the world as delineating international legal obligations. 12/ Their provisions proscribing the death penalty for

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11/ Opened for signature April 23, 1983, entered into force March 1, 1985, 1983 Europ. T.S. No. 114, reprinted in 22 I.L.M. 539 (1983).

12/ The greater the number of parties to such international human rights treaties the greater the inference that these instruments have become customary international law. As the International Court of Justice stated in the North Sea Cases: "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that . . . a very widespread and representative participation in the convention might suffice of itself . . . ." North Sea Continental Shelf Cases, 1969 I.C.J. 42.

juvenile offenders are clear and unambiguous.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War has been ratified by 161 nations. 13/ It provides in pertinent part:

> In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.

Article 6(5) of the International Covenant on Civil and Political Rights, which has been ratified by eighty-six nations of the world, including most of

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13/ 247 International Review of the Red Cross 257 (July/Aug. 1985). This is the number of parties as of December 31, 1984.

Western Europe and Canada, and signed by another seven, 14/ reads:

> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

The prohibition against the execution of juvenile offenders in the American Convention on Human Rights, which has been ratified by nineteen American States and signed by an additional three, 15/ is found at Article 4(5):

> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years or age; nor shall it be applied to pregnant women.

14/ Multilateral Treaties Deposited with the Secretary General of the U.N. at 124, U.N. Doc. ST/LEG/SER. E/3 (1985). This is the number of ratifications as of December 31, 1984.

15/ Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II, 65, Doc. 6, July 1, 1985, at 63.

Under both the International Covenant on Civil and Political Rights (Article 4(2)), and the American Convention on Human Rights, (Article 27(2)) the prohibition against imposition of the death penalty on juvenile offenders admits of no derogation. 16/ Unquestionably, these treaty prohibitions provide important and authoritative evidence of the customary norm against the execution of juvenile offenders. Records of the debates surrounding the development of the conventions and other indications of opinio juris found in the travaux preparatoires of these conventions demonstrate that their prohibitions against these executions are

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16/ Likewise, under Article 3 of Protocol No. 6 to the European Convention on Human Rights, supra note 10, no derogation from the Protocol is allowed nor may reservations in respect of the Protocol be made under its Article 4.

in fact codifications of customary international law.

a. The Fourth Geneva Convention Relative to the Protection of Civilians in Time of War

The Fourth Geneva Convention, signed in 1949, marked the initial stages of development for the customary international norm prohibiting the execution of juvenile offenders. This Convention has its origins in the Draft Convention for the Protection of Civilian Persons in Time of War, approved by the XVIIth International Red Cross Conference in August of 1948. 17/ Article 59 of this draft read: "The death penalty may not be pronounced against a protected

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17/ Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, n.d., Vol. I, at 113.

person under eighteen years for any offense whatsoever." 18/

The Geneva Conventions, of course, apply principally to periods of international armed conflict and Article 68 forbids the execution of both civilians and military personnel no longer in combat who committed offenses prior to the age of eighteen. If nearly all the nations of the world, including the United States, have agreed to such a norm in periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force during peacetime.

b. The International Covenant on Civil and Political Rights

During the debates surrounding the adoption of Article 6 of the

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18/ Id. at 123.

International Covenant, there was no opposition to the view that permitting executions of juvenile offenders was contrary to human rights principles. 19/ The travaux reveal that the drafters of Article 6 believed that the prohibition against juvenile executions represented a consensus of nations. 20/

Significantly, the travaux make clear that the Article 6(5) prohibition was no more than the codification of an already existing binding norm. 21/ The U.N. General Assembly resolution which recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States,

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19/ Hartman, supra note 1, at 671-72.

20/ Id. at 672 and n.64, and citations noted therein.

21/ Id.

not only ratifying states, 22/ also evidences State practice supporting the position that the prohibition against juvenile executions is customary international law.

c. The American Convention on Human Rights

The draft proposal of Article 4(5) was patterned after the International Covenant's prohibition on execution of juvenile offenders. 23/ Drafters of the Convention settled upon this formula, recognizing that total abolition of the death penalty was not possible in the context of the Convention.

22/ Id. at 681 n.94; G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980). Although the United States did not participate in the Article 6 debates, it did support this General Assembly Resolution.

23/ Hartman, supra note 1, at 672-73 n.66, and sources cited therein.

Hence, the American Convention, the International Covenant on Civil and Political Rights, and the Fourth Geneva Convention, with their accompanying statements regarding pre-existing customary law, 24/ provide strong evidence that there exists a high degree of consensus among a large number of

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24/ Other evidence that a customary law norm exists includes the action of the U.N. Economic and Social Council (ECOSOC) which adopted, pursuant to a resolution, safeguards relating to the death penalty, one of which was a prohibition against the execution of persons who committed crimes below the age of 18 years. E.C.S. Res. 1984/50, U.N. ESCOR Supp. (No. 1), at 33, U.N. Doc. E/1984/84 (1984).

Moreover, in September of 1985, the Seventh U.N. Congress on the Prevention of Crime and Treatment of Offenders adopted Resolution No. 15, endorsing the ECOSOC safeguards and urging all states retaining the death penalty to implement them. The U.S. also consented to this resolution. Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) at 86-87, U.N. Doc. A/CONF.121/22 (1985).

nations that executions of juvenile offenders are forbidden.

2. National Laws and Practice

Further evidence of State practice appears in the national laws of over eighty nations, including almost all Western European countries, which have either abolished the death penalty or forbidden it for certain offenses and for certain offenders, including juveniles. Significantly, these nations range widely in political, religious and cultural tradition. 25/

Recent data compiled by Amnesty International reveals that twenty-eight countries have completely abolished the death penalty while eighteen additional countries provide for the death penalty only for exceptional crimes, such as

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25/ Hartman, supra note 1, at 666, and n.44.

crimes under military law, or for crimes committed under exceptional circumstances, such as wartime. 26/ Other studies show that, among the countries for which data was reported, forty-one of the retentionist countries had statutory provisions exempting juveniles from the death penalty, five of the listed countries being Member States of the OAS. 27/

Even in the United States, laws in various jurisdictions which retain the death penalty nonetheless recognize that

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26/ Amnesty International Document ACT 05/19/85, The Death Penalty List of Abolitionist and Retentionist Countries (June 1985).

27/ Hartman, supra note 1, at 666 n.44. The data used by this scholar was compiled based on information from the State Department, the United Nations and Amnesty International. The author acknowledges that data is often incomplete and not always perfectly accurate. Id. at 667.

special considerations apply to juvenile offenders with at least twenty-one states setting a minimum age for imposition of the death penalty. 28/ This practice is underscored by the declarations of various prestigious United States legal bodies, including the American Law Institute and the American Bar Association, which have publicly opposed execution of persons who committed crimes under the age of eighteen. 29/

28/ V. Streib, Minimum Statutory Ages for the Death Penalty (October 1, 1985) (unpublished memorandum). Nine require that the minimum age be at least 18 (including the recent addition of New Jersey, Indiana and Maryland). Twelve additional jurisdictions without a minimum age requirement expressly provide for age as one of the mitigating factors in imposing the death sentence. Id.

29/ American Law Institute Model Penal Code § 210.6(1)(d) (Proposed Official Draft, 1962); § 210.6, Comment, 1331 Official Draft and Revised Comments (1980); American Bar Association Report No. 117A, approved August 1983.

Thus, the practice of nations, when considered along with widely ratified human rights treaties, evidences an abhorrence of the imposition of the death penalty upon juvenile offenders which rises to the level of a customary norm of international law. 30/

30/ In a recent decision in a case involving the issue of the execution of juvenile offenders the United States Inter-American Commission on Human Rights concluded that the United States was violating its international legal obligations by permitting the execution of juvenile offenders. IACHR Resolution 3/87, case No. 9647 (Roach & Pinkerton v. United States), OEA Ser. L/V/II 69, Doc. 17, paras. 64-65 (March 27, 1987). The Commission concluded that the execution of "children" is prohibited by international law. Id. at para. 56. However, it also stated, in dicta, that "there does not now exist a norm of customary international law establishing eighteen to be the minimum age for imposition of the death penalty." Id. at para. 60. Amicus submits that the execution of Thompson, who was fifteen at the time he committed the crime for which he was sentenced to death, would violate the principle found by the Commission.

C. The United States Does Not Qualify As A Persistent Objector To The International Norm Prohibiting The Execution Of Juvenile Offenders.

A State may prevent itself from becoming bound by a rule of customary international law if: (A) the State mounts an explicit and disciplined opposition to the coalescing norm; 31/ and (B) the State has maintained consistent opposition since the rule's formation. 32/ The United States, however, has never affirmatively nor openly opposed the formation of the

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31/ Hartman, supra note 1 at 686 n.113; Schacter, "Nature and Process of Legal Development in International Society," in Structure and Process of International Law, 745, 779 (1983); Stein, The Approach of the Different Drummer: The Principle of Persistent Objector in International Law, 26 Harv. Int'l. L. J. 457, 479 (1985).

32/ Norwegian Fisheries Case, (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Judgment of December 18); Akehurst, supra note 7.

customary international norm prohibiting the execution of juvenile offenders and is, therefore, bound by that rule.

To qualify as a persistent objector to a customary international norm, a State must show that the rule in question has never applied to it because of its "open dissent during the formation of the rule prior to its crystallization." 33/ The International Court of Justice has ruled that a State which unequivocally and consistently manifested a refusal to accept a rule from the moment of creation would qualify as a persistent objector. 34/ One

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33/ Schacter, supra note 31, at 779 (emphasis added).

34/ Brownlie, Principles in Public International Law 11 (1979), citing Norwegian Fisheries Case, supra note 32, at 131 (emphasis added), in which the Court ruled that Norway would qualify as

[Footnote continued]

scholar described the criteria for persistent objection as follows:

> Passive failure to bring domestic law into conformity with established international standards should not be accepted as adequate protest . . . . A dissenting state, to release itself from the binding force of a developing customary rule of international law, has an obligation to mount explicit and principled opposition to the coalescing norm, or it will find itself authoritatively bound to the international standard. 35/

There is no evidence pointing to an unequivocal manifestation of United States' opposition to the customary international norm prohibiting the execution of juveniles.

34/ [Footnote continued]

a persistent objector to the rule prohibiting the enclosure of bays by baselines exceeding ten miles in length because the government had always opposed the rule.

35/ Hartman, supra note 1, at 686 n.113 (emphasis added).

The formation of the norm prohibiting the execution of juvenile offenders commenced with the Fourth Geneva Convention and has been recognized in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the recent proposed draft of the Convention on the Rights of the Child, the Beijing Rules on the Minimum Standards for the Administration of Juvenile Justice, and the practice of nations. The United States voiced no opposition to the rule prohibiting the imposition of the death penalty on juvenile offenders during the drafting stages of four of the five international instruments identified above. The few equivocal statements made by United States' officials do not rise to the level of explicit and consistent protest to the formation of the customary

international rule against the execution of juvenile offenders.

1. Article 68, para. 4 of the Fourth Geneva Convention

The United States signed and ratified the Fourth Geneva Convention without asserting any opposition to Article 68, para. 4. 36/ The only statement made by the United States regarding Article 68, para. 4 of the final version came during a Committee meeting at the Diplomatic Conferences in Geneva. The United States delegate stated

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36/ The United States attached an unrelated reservation to Article 68(2) which read:

> The United States reserves the right to impose the death penalty in accordance with provisions of Article 68, paragraph 2, without regard to whether offenses referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.

> the abolition of the death penalty in the case of protected persons under 18 years of age was a matter which called for very careful consideration before such a sweeping provision was adopted. 37/

This statement, however, does not constitute an unequivocal and principled statement of opposition. The United States never made any reservation whatsoever to this paragraph of the Convention. Moreover, after Article 68, para. 1, was sent back to the Drafting Committee for revision, United States delegate McCahon expressed support for the prohibition on the grounds that "the test reduced the number of cases in which

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37/ Comment by Mr. Ginnane, in 19th Mtg of Committee III, May 19, 1949, in Final Report of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, n.d. Vol. II, § A, at 673.

the death penalty could be imposed." 38/ During the remainder of the conference, the United States delegation focused on paragraph 2 of Article 68, but never again mentioned the provision prohibiting the execution of those under eighteen at the time of their offense. On August 3, 1949, Article 68 as a whole was adopted by thirty-three votes to five, with five abstentions. 39/ Thus, in the earliest stages of its formation, the United States failed to mount any unequivocal opposition to the rule excluding juvenile offenders from punishment by death.

38/ Comment by Mr. McCahon in 47th Mtg, Committee III, July 14, 1949, id., at 789.

39/ 27th Plenary Mtg, id., Vol. II, § B, at 431.

2. Article 6(5) of the International Covenant

The United States took no position on the substance of the death penalty limitations in Article 6(5) of the International Covenant because it declined to participate in the crucial 1957 Third Committee debates regarding the drafting of Article 6 of the International Covenant. 40/ Nevertheless, the United States representative eventually voted in favor of adoption of the International Covenant in 1966 without expressing concern over Article 6(5). 41/ The United States subsequently sponsored a United Nations

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40/ Hartman, supra note 1, at 684.

41/ V. Bite, The United States and International Human Rights Treaties: A Summary of Provisions and Status in the Ratification Process, Foreign Affairs and National Defense Division, Congressional Research Service Report No. 83-175 F at 17 (1983).

General Assembly Resolution that recognized Article 6 of the International Covenant as expressing a "minimum standard" for all states. 42/

The International Covenant was signed by President Carter on October 5, 1977, and still no opposition was raised to Article 6(5). 43/ President Carter then submitted the International Covenant to the Senate in 1978. 44/ At that time the President transmitted a memorandum from the State Department proposing a number of reservations and understandings including the statement:

> The United States reserves the right to impose capital punishment on any person duly convicted under existing or

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42/ G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

43/ V. Bite, supra note 47, at 17.

44/ Department of State Bulletin, January 16, 1977 at 106.

future laws permitting the imposition of capital punishment.

This proposed reservation is insufficient as an objection to the international customary rule prohibiting the execution of juvenile offenders for three reasons. First, the reservation has never been presented to the international community. Because the Senate has yet to act on the President's recommendations, the proposed reservation by former President Carter has an ambiguous status as merely a proposal for consideration. Second, the proposed reservation was suggested twelve years after the International Covenant was adopted by the General Assembly, and so fails to satisfy the requirement that the opposition be manifested during the early days of the rule's formation. Third, the wording of the reservation does not meet the test of an explicit and principled

manifestation of refusal to follow the international norm.

Furthermore, the State Department specifically denied that the proposed reservation applied to juvenile offenders or pregnant women. The State Department explained to a Senate hearing that the purpose of the reservation to Article 6(5) of the International Covenant

> is to avoid the assumption of an international obligation to meet certain standards which the United States domestic law does not currently meet. Its purpose was certainly not the preservation of any right to execute children or pregnant women, something never done in the United States. 45/

45/ International Human Rights Treaties: Hearings before the Committee on Foreign Relations; 96th Cong., 1st Sess. ct. 1, 55 (1979). Response by the State Department to the "Critique of Reservations to International Human Rights Covenants" by the Lawyers' Committee for International Human Rights. This statement is now inaccurate since three juvenile offenders have been executed in this country in recent years.

This denial by the State Department clearly undercuts any claim that the United States has persistently objected to the customary norm prohibiting the execution of persons younger than eighteen at the time of the offense.

3. Article 4(5) of the American Convention

United States representatives to the 1969 San Jose Conference apparently acquiesced in the drafting of Article 4 of the American Convention, as no evidence exists to prove otherwise. Based on its comments in the travaux preparatoires, the United States' delegation does not appear to have opposed per se the notion that the execution of juvenile offenders should be prohibited. Rather the delegation seems to have been more concerned that setting specific age limits on the imposition of the death penalty did not adequately take

into account the "already apparent" trend towards gradual abolition of the death penalty. The United States delegation stated at the time of the drafting of the convention:

> The proscription of capital punishment within arbitrary age limits presents various difficulties in law, and fails to take account of the general trend, already apparent, for the gradual abolition of the death penalty . . . . For this reason we believe the text will be stronger and more effective if this paragraph is deleted. 46/

President Carter signed the American Convention on June 1, 1977, with no comment regarding the provision prohibiting the execution of juvenile

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46/ 2 Buergenthal and Norris "Observations and Proposed Amendments to the Draft of the Inter-American Convention on Protection of Human Rights," Human Rights: The Inter-American System, Booklet 13, at 152 (1982) (emphasis added).

offenders. 47/ The reservation proposed by the State Department to Article 4(5) of the American Convention, similar to the proposed reservation to Article 6(5) of the International Covenant, is insufficient to support a contention that there has been a pattern of persistent objection to this customary international norm. 48/

47/ V. Bite, supra note 41, at 77.

48/ The Inter-American Commission in its decision in Case No. 9647, supra note 32, states that "since the United States has protested the norm, it would not be applicable to the United States should it be held to exist." Id. at para. 54. The only evidence of a United States protest of the norm is the proposed reservation transmitted to the Senate when the American Convention was submitted for ratification. However, as stated above, this internal transmission by the Executive Branch to the Legislative Branch simply cannot qualify as evidence of a persistent objection to a norm sufficient to release the United States from an obligation to comply with the norm.

4. Article 19(2)(b) of the Proposed Draft Convention on the Rights of the Child

Article 19(2)(b) of the proposed Convention on the Rights of the Child, formulated by an informal working party, reads:

> Capital punishment or life imprisonment without possibility of release is not imposed for crimes committed by persons below eighteen years of age. 49/

The United States representative placed on record a reservation to the age limit, but this reservation was made in March of 1986. 50/ It came too late to release the United States from the binding effect of the customary norm

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49/ Report of the Working Group on a Draft Convention on the Rights of the Child, 42 UN ESCOC Commission on Human Rights (Agenda Item 13) U.N. Doc. E/CN. 4/1986/39 (1986).

50/ Id. at 24.

prohibiting the imposition of the death penalty on juvenile offenders.

In addition, the reservation was not sufficiently explicit to relieve the United States of its international legal obligations. The United States representative voiced disagreement with the proposal to adopt eighteen as the age limit, as previously accepted in various international instruments. 51/ She did not disagree with the general proposition that the death penalty should be abolished in the case of juvenile offenders. Furthermore, the United States representative specifically stated that she would not insist on any changes and block consensus on Article 19(2)(b). 52/ These statements hardly

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51/ Id.

52/ Id.

qualify as "unequivocal" and "explicit" statements of opposition. While the United States reservation may operate in regards to this particular international instrument, it cannot operate in regards to the customary international norm.

As has been demonstrated, the United States does not qualify as a persistent objector to the international norm prohibiting the imposition of the death penalty for crimes committed by children below the age of eighteen and, consequently, is bound by it. The United States failed to oppose this customary norm during its early days of formation and there has been no consistent United States opposition to this norm since it was established.

II. UNDER TREATIES IT HAS SIGNED BUT NOT RATIFIED, THE UNITED STATES HAS LEGAL OBLIGATIONS WHICH ARE BREACHED WHEN JUVENILES ARE EXECUTED

As discussed above, the United States has signed the International Covenant and the American Convention, both of which forbid the execution of juvenile offenders. Amicus submits that as a result of having signed these treaties, the United States incurred legal obligations which are violated when juvenile offenders are executed.

Article 18 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") 53/ provides that:

> [a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

53/ U.N. Doc. A/CONF. 39/27 (1969), reprinted at 8 I.L.M. 679 (1969), transmitted to the Senate for advice and consent to ratification on Nov. 21, 1971, but not yet ratified.

> a. it has signed the treaty. . .subject to ratification. . .until it shall have made its intention clear not to become a party to the treaty.

The United States has accepted the Vienna Convention as "the authoritative guide to current treaty law and practice," 54/ and customary international law is to the same effect. 55/

The Restatement (Revised) of the Foreign Relations Law of the United States incorporates Article 18 of the Vienna Convention into § 312(3). As an

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54/ Letter of Submittal to the President, S. Exec. Doc. L., 92nd Cong., 1st Sess. 1 (1971). See also Interpretation of Treaties, 75 A.J. Int'l.Law 147 (1981).

55/ International Law Commission, Report to the General Assembly (1966), 2 Ybk. Int'l. L. Comm'n. 172, 202. See also McNair, The Law of Treaties (1961) at 199; Anzilotti, Courts de droit international (Gidel trans. (1929)) at 372. Customary law is binding on the United States. The Paquete Habana, supra.

example of an act which would "defeat the object and purpose" of a treaty, the Restatement discusses a test of a new nuclear weapon in contravention of a provision prohibiting such tests in a signed but unratified treaty. The effects of such a test, which would release significant radioactivity into the atmosphere, would be irreversible, since the atmospheric contamination could not be called back. 56/ Since the injury is irreversible, the Restatement concludes, such an act would defeat the object and purpose of the treaty in the sense forbidden by the Vienna Convention and customary international law.

Similarly, a life taken by execution is irretrievable. Each time

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56/ Restatement (Revised) of the Foreign Relations Law of the United States, 2 A.L.I. Tent. Draft No. 6, § 312, Comment i (1985).

the United States permits the execution of a juvenile offender, the purpose and object of the signed but unratified human rights treaties are defeated in the sense proscribed by the Vienna Convention and the Restatement. Thus, legal obligations binding on the United States are breached.

III. EVEN IF THE COURT HOLDS THAT THE STATES ARE NOT BOUND BY THE CUSTOMARY NORM PROHIBITING THE EXECUTION OF JUVENILE OFFENDERS, THE INTERPRETATION OF THE EIGHTH AMENDMENT SHOULD BE INFORMED BY THAT NORM

In interpreting the Eighth Amendment's prohibition against "cruel and unusual punishment", the Court has taken account of "the climate of international opinion concerning the acceptability of a particular punishment." Coker v. Georgia, 433 U.S. 584 (1976). The Court considered international practice in Trop v. Dulles, 356 U.S. 86 (1958), in holding that loss

of nationality was an excessive, and therefore unconstitutional, sanction for desertion from the armed forces. Id. at 102. In Coker, supra, the death penalty for rape was held to be unconstitutionally excessive punishment; the Court noted United Nations documents indicating that only three out of sixty nations surveyed retained capital punishment in rape cases. Id., at 597, n.10. Recently, the Court again referred explicitly to "international opinion" in determining that the death sentence violated the Eighth Amendment when imposed on an offender who had not intended to kill his victim. Enmund v. Florida, 458 U.S. 782, 796 (1982).

There exists a well-developed, unequivocal customary international norm prohibiting the execution of juvenile offenders. Whatever the Court's conclusion regarding the binding nature

of that norm on the several states, amicus submits that, at a minimum, the Court should take account of that norm in giving meaning to the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

The practice of executing juvenile offenders is one that has clearly been rejected by the majority of the nations of the world. The multilateral treaties discussed herein, the travaux preparatoire related to those treaties, the domestic laws of numerous nations, the writings of experts and the resolutions of the United Nations all evidence a newly emerged norm of customary international law that is binding on the United States and on the several states under the Supremacy Clause of the Constitution.

Even if the Court does not find that such a binding norm exists, the Court should consider the almost universal international abhorrence to the execution of juvenile offenders in construing the Eighth Amendment's prohibition against cruel and unusual punishment in this case.

For all of these reasons, amicus respectfully urges this Court to reverse the decision of the Oklahoma Court of Criminal Appeals below.

Respectfully
submitted,

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